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POLITICAL SCIENCE QUARTERLY

POPULAR LEGISLATION IN THE UNITED STATES

THE DEVELOPMENT OF THE SYSTEM

NEITHER the initiative nor the referendum is new even in America. Both were employed in colonial Rhode Island before the middle of the seventeenth century.¹ The initiative, as early as the third year of the Revolutionary War, was embodied in the first constitution of Georgia.² It was proposed and nearly adopted in the Pennsylvania convention³ of 1837, and it was introduced in a modified form into the Virginia instrument⁴ of 1850. The referendum has had a much more extensive history. It was frequently employed in colonial times, especially in New England, and during the nineteenth century it came to be used in many states, particularly in local legislation; while the constitutional referendum, adopted in all the states with the single exception of Delaware, has familiarized the American people with the practice of the direct popular ratification of the fundamental laws. But the revival and combination of the two systems in such a way as to include all legislation is recent.⁵ Public interest in the subject appears to

¹ Records of the Colony, I, 148, 149.

A distinguished Rhode Island writer says that "the power of the freemen of the towns to initiate legislation has never been formally abolished but is only lost through non-use." Amasa M. Eaton, in 13 *Harvard Law Review*, p. 588.

² Article lxiii.

³ Proceedings and Debates, XII, 58, 84.

⁴ Article iv, section 5.

⁵ This is even more true of England. So late as 1863, Mr. Freeman said: "Nobody has ever proposed that every adult male should vote in the making of laws, but only in the choosing of lawgivers." *History of Federal Government*, p. 72, note.

have been first aroused in our time by the publication, a score of years ago, of Mr. Bryce's classical study of American politics,¹ and it was increased by Dr. Borgeaud's writings.² The comparison of our political institutions with those of the Swiss was a revelation to most Americans and led to a study of the earlier half-forgotten chapters in our national experience. Ten years have now elapsed since the subject first passed from academic discussion to practical legislation, and it seems a fitting time to review the progress of the movement and estimate its results.

South Dakota.—The first formal adoption in America of the initiative and referendum as applicable to all legislation occurred in South Dakota. In 1897 a joint resolution was passed by the legislature of that state, proposing an amendment to the state constitution.³ It provided that

The legislative power of the state shall be vested in a legislature, which shall consist of a senate and house of representatives, except that the people expressly reserve to themselves the right to propose measures, which measures the legislature shall enact and submit to a vote of the electors of the state, and also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions.⁴

The section further provides that not more than five per cent of

¹ The American Commonwealth (1888), I, 448 *et seq.*

² Rise of Modern Democracy in Old and New England (1894), Adoption and Amendment of Constitutions (1895).

³ South Dakota Laws, 5th session, ch. 39.

⁴ The last clause has been construed by the Supreme Court of South Dakota, in connection with other constitutional provisions, to include legislative acts passed with the so-called emergency clause, to which, it is held, the amendment does not apply. State *ex rel.* Lavin *v.* Bacon, 14 South Dakota, 394. This, it will be seen, may sensibly narrow the scope of the referendum, since the legislature may decide to insert an emergency clause in any act. The decision is based, however, upon the peculiar wording of the South Dakota constitution.

the electors need petition to invoke its provisions, that the governor's veto power shall not be applicable thereto, and that the system shall apply to municipalities.¹

The proposal came before the people in November of the following year and was adopted by a pronounced majority.² By its terms the legislature was directed to make suitable provisions for carrying the measure into effect; ³ and at its ensuing session that body passed an act providing the method of invoking the privileges of the amendment in the case of state legislation,⁴ and an act making it applicable to municipal ordinances and resolutions.⁵ The state is said to have secured fairly satisfactory results from the operation of the law.⁶

Utah.—The next state to make provision for direct popular

¹ South Dakota Laws, 1897, ch. 39, sec. 2.

In the same year, but a little more than a month later, the Nebraska legislature passed an act extending the referendum to any "municipal subdivision." Nebraska Laws, 1897, ch. 32; Nebraska House Journal, 1897, p. 1160.

In 1901, the Illinois legislature passed "an act providing for an expression of opinion by electors on questions of public policy at any general or special election." The initiative must be taken by ten per cent of the registered voters of the state or twenty-five per cent of those of a smaller subdivision. Illinois Laws, 1901, p. 198.

In 1905 the Texas legislature enacted an elaborate election law (Texas General Laws, 1905, 1st called session, ch. 11, sec. 142) which provides, *inter alia* :

"Whenever delegates are to be selected by any political party to any state or county convention by primary election or primary convention or candidates are instructed for or nominated, it shall be the duty of the chairman of the county or precinct executive committee of said political party upon application of ten per cent of the members . . . to submit at the time and place of selecting said delegates any proposition desired to be voted on by said voters, and the delegates selected at that time shall be considered instructed for whichever proposition for which a majority of the votes are cast." Details as to the manner of invoking the system are also provided and have already been applied. See *Referendum News*, vol. i, no. 8, p. 9.

² 23,816 as against 16,483; South Dakota Laws, 7th session, 1901, p. xii, note. Governor Lee, in his message to the legislature of 1899, closed as follows a passage devoted to praise of the new system: "The large plurality by which the amendment was ratified at the polls indicates how generally its simple provisions were understood and how popular they were with the masses who will be beneficiaries of their successful operation." South Dakota House Journal, 6th session (Pierre, 1899), pp. 131, 132.

³ South Dakota Laws, 5th session, ch. 39, sec. 2.

⁴ *Ibid.*, 6th session, ch. 93.

⁵ *Ibid.*, ch. 94.

⁶ M. A. Schaffner, "The Initiative, the Referendum and the Recall," in *American Political Science Review*, II, 33.

legislation was Utah. Its legislature in 1899 proposed by joint resolution¹ a constitutional amendment establishing the initiative and the referendum. After reciting that the law-making power shall be vested in the people as well as in the legislature, it was provided that

The legal voters, or such fractional part thereof, of the state of Utah as may be provided by law, under such conditions and in such manner and within such time as may be provided by law, may initiate any desired legislation and cause the same to be submitted to a vote of the people for approval or rejection, or may require any law passed by the legislature (except those laws passed by a two-thirds vote of the members elected to each house of the legislature) to be submitted to the voters of the state before such law shall take effect.²

A subsequent clause made the same provision applicable to "any legal subdivision of the state" and "the law-making body" thereof.³ The entire proposal was voted upon at the election in November, 1900, and it was adopted by a majority of nearly three to one.⁴

Notwithstanding this emphatic expression of popular approval, the movement seems to have made little further progress in Utah. Governor Wells, in his message of 1901,⁵ called attention to the fact that legislation was necessary in order to carry these provisions into effect; and it is apparent that this is even more true than in South Dakota, since by the express terms of the Utah amendment the conditions, manner and time of the popular initiative and the number of voters requisite are left to be "provided by law." Up to this time, however, the necessary laws have not been enacted.

Oregon.—The movement toward the new system of legislation began in Oregon earlier than in Utah, but it was retarded by the constitutional requirement⁶ of action by two successive

¹ Utah Senate Journal, 3rd session, p. 453.

² *Ibid.*

³ *Ibid.*

⁴ 19,219 as against 7786; Report of the Utah Secretary of State, 1899-1900, p. 46.

⁵ *Ibid.*, p. 39.

⁶ Oregon Constitution, art. xvii, sec. 1.

legislatures. On February 6, 1899,¹ the governor approved a concurrent resolution² of the two legislative branches proposing a constitutional amendment providing for the initiative and referendum. This amendment was more elaborate in its phraseology than either the South Dakota or the Utah amendment. It contained most of the provisions of the former, but it did not include municipal legislation. The second step was taken at the session of 1901, when an act³ was passed formally submitting the amendment to the voters. It came before them at the June election of 1902, and was ratified by a majority of about eleven to one.⁴

While the Oregon amendment was more complete in detail than any previously adopted, it nevertheless contemplated further legislation affecting procedure. This was provided in 1903 by a comprehensive act which applied not only to ordinary statutes but to constitutional amendments as well.⁵ It greatly reduced the time required to procure adoption of the latter; and it permitted the distribution by the secretary of state of literature furnished by the advocates and opponents of any proposed amendment.⁶

The amendment had yet, however, to run the gauntlet of the courts. In 1903 an action reached the Supreme Court in which the validity of the amendment was assailed on several grounds, one of which was that it violated the article of the federal constitution guaranteeing to each state "a republican form of government." The court in an exhaustive opinion upheld the amendment *in toto*, and as to the objection just mentioned it observed: "The initiative and referendum amendment does not abolish or destroy the republican form of government or

¹ The Utah resolution was passed on March 9 of the same year.

² Oregon Laws, 1899, p. 1129.

³ *Ibid.*, 1901, p. 4.

⁴ 62,024 as against 5668, the total vote cast at the election being 92,920. New York State Library Report, 1903, p. 723.

⁵ Oregon Laws, 1903, p. 244.

⁶ *Ibid.*, sec. 8. See a discussion of this feature in an article by Professor George H. Haynes, "The Education of Voters," in *POLITICAL SCIENCE QUARTERLY*, XXII, 484-497. The entire act has been superseded by the more elaborate provisions of ch. 226 of Oregon Laws, 1907.

substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power.”¹

The people of Oregon have not been slow to avail themselves of the new system. Through it they have already adopted a direct primary law,² a local option law,³ constitutional amendments⁴ extending the system to municipal legislation and allowing the referendum as to items and parts of acts,⁵ laws imposing taxes upon the gross earnings of public-service corporations and prohibiting free passes.⁶ As this is but the partial⁷ fruitage of only half a dozen years, it would seem that the system is destined to play a large part in the legislative history of the “Sunset State.”

Nevada.—As in Oregon, so in Nevada, which was the next state to take action on the referendum, an amendment to the constitution⁸ requires the approval of two successive legislatures. The Nevada legislature of 1901 adopted a joint and concurrent resolution⁹ embodying the principle of the referendum but not providing for the initiative. At the session of 1903 this resolution does not appear to have been specifically approved, but another was adopted with almost the same phraseology as the Oregon amendment.¹⁰ The amendment ratified by the people at the general election of 1904¹¹ appears, however, to have been that which was proposed in 1901, and as such it was inserted in an official edition of the constitution as amended,¹² perhaps on the theory that the second resolution necessarily included and involved approval of the first. Inasmuch, however,

¹ *Kaddery v. Portland*, 44 Oregon, 118, 145. See a discussion of this case in *The Arena*, XXXII, 128.

² Oregon Laws, 1905, ch. 1.

³ *Ibid.*, ch. 2.

⁴ N. Y. State Library Bulletin of Legislation, 110 (1906), 115c.

⁵ Oregon Laws, 1907, ch. 1, 2.

⁶ *Referendum News*, vol. 1, no. 9, p. 3.

⁷ *Ibid.*

⁸ Nevada Constitution, art. xvi, sec. 1.

⁹ Nevada Laws, 20th session (Carson, 1901), p. 139.

¹⁰ *Ibid.*, 21st session (Carson, 1903), p. 231.

¹¹ *Ibid.*, 22nd session (Carson, 1905), pp. 339, 340.

¹² *Ibid.*

as the constitution expressly requires¹ that "such proposed amendment . . . shall be agreed to" by the second legislature, it would seem to preclude the substitution of an amendment which, although embodying the substance of the original proposal, varies therefrom in form. In the latest official edition² of the Nevada constitution the amendment in question is omitted.

Missouri.—In 1903 the legislature of Missouri adopted a joint and concurrent resolution³ proposing a constitutional amendment which provided, in much the same phraseology as that adopted in Oregon, for the initiative and referendum. It came before the electors of Missouri but failed of adoption.⁴ This seems to be the first instance of such a failure where the system has been placed fairly before the people. The legislature of 1907, however, resubmitted the proposal⁵ in slightly modified terms,⁶ and it comes again before the voters at the general election of 1908.

Montana.—In 1905 the Montana legislature proposed an initiative and referendum amendment,⁷ which appears to have been modeled upon the Oregon provision. This amendment went to the people at the general election of 1906 and was adopted.⁸ In 1907 the legislature passed an act regulating the details of procedure, and including the Oregon plan for instructing the voters by means of literature furnished by those initiating or opposing a measure and distributed by the secretary of state.

¹ Art. xvi, sec. 1.

² Nevada Laws, 23rd session (Carson, 1907), p. 486.

³ Missouri Laws, 1903, p. 180.

⁴ *Ibid.*, 1905, pp. 312-325. N. Y. State Library Legislative Bulletin, 1904, 115b.

⁵ Missouri Laws, 1907, p. 452.

⁶ Laws appropriating money for current expenses and state institutions are excepted. A petition of eight per cent is required for the exercise of the initiative and ten per cent for the referendum, while municipal legislation is not expressly included.

⁷ Montana Laws, 1905, ch. 61.

⁸ N. Y. State Library Index of Legislation, 1906, 115b.

⁹ Montana Laws, 1907, ch. 62.

Delaware.—Although Delaware is distinguished as the one state in which the people have had no share in adopting or amending a constitution, and although the statutory referendum has been almost unknown there,¹ its legislature in 1905 submitted² to the electors the question: "Shall the general assembly of the state of Delaware provide a system of advisory initiative and advisory referendum?" The election was held in November, 1906, and of those voting on the question six-sevenths expressed themselves in its favor.³ One year later the system was applied in determining whether liquor licenses should be granted, a majority of the electors in two out of the three counties voting in the negative.

Maine.—At its session of 1907 the legislature of Maine adopted an elaborate proposal⁴ for a constitutional amendment establishing direct popular legislation. It includes the main features of the Oregon measure. It also provides for public hearings before the legislature and for selection from several competing measures. This amendment was adopted by a very large majority at the state election in September, 1908.

North Dakota.—The legislature of this state also submitted in 1907, to be voted on in 1908, an amendment to the constitution providing for the initiative and referendum. It likewise embodies many provisions of the Oregon law, but is expressly declared to be self-executing, and it fixes as the basis for determining whether a measure has received a popular majority the vote cast for justices of the Supreme Court.⁵

Oklahoma.—The latest commonwealth (prior to 1908) to join the movement for the initiative and referendum, and the first to

¹ The one conspicuous instance—the attempted submission of a prohibitory liquor law in 1847—was frustrated by the decision of the Supreme Court in *Rice v. Foster*, 4 Harr. (Del.), 479.

² Delaware Laws, 1904-05, ch. 53.

³ N. Y. State Library Index of Legislation, 1906, 1112a.

⁴ Maine Acts and Resolves, 1907, ch. 121.

⁵ For the text of this proposed amendment, see *Equity*, vol. ix, p. 7.

embody it in an original constitution, is Oklahoma. This newest of our states enters the Union with a fundamental code, ratified by an unusual majority, which devotes an entire article¹ to the new system. In general, Oklahoma follows the Oregon plan, but the system is made applicable to items and parts of acts² and to county, district and municipal legislation.³ The article appears sufficiently specific to be self-executing, but it provides for further legislation "to prevent corruption in making, procuring and submitting initiative and referendum petitions."⁴

Such then is the present status of the initiative and referendum in America, as revived and reëstablished upon Swiss models. Without assuming to forecast the future we may summarize the results as follows:

(1) Everywhere the system is merely an alternative one. No attempt has been made to abolish law-making by the representative legislature, but only to supplement it with law-making by popular vote, and this, too, not in all cases, since matters requiring speedy action are still left to the representative body.

(2) While the present movement started in the trans-Missouri region and has had its greatest development there, it has also spread to other states, including the one state which has never employed the constitutional referendum. The movement has not been confined to states dominated by either one of the two great political parties. The movement, in fact, is neither sectional nor partisan.

(3) The system has as yet been fairly tested in one state only, Oregon. If it has there produced evil results, they have not been made known to the country at large. No radical or otherwise objectionable measures have been enacted by this method. The two most conspicuous achievements of direct popular legislation in Oregon—the laws providing for the direct primary and for taxing the gross earnings of corporations—have long been urged by conservative reformers elsewhere. Nor

¹ Oklahoma Constitution, 1907, art. v.

² *Ibid.*, sec. 4.

³ *Ibid.*, sec. 5.

⁴ *Ibid.*, sec. 8.

has there been any such lack of interest on the part of the electorate as would indicate that good measures are likely to fail, or bad ones to be adopted, through the indifference of the better class.¹ At the last general election in Oregon the vote on one of the measures submitted rose to seven-eighths of the total vote for governor.² Even in a state where, though authorized, it has been little used, its value in abolishing the lobby has been attested by the chief executive.³

Finally the educational influence of the system, especially when coupled with special features like those already noticed in Oregon and Montana, should not be ignored. The movement on the whole is one of the most significant of contemporary political tendencies in America and furnishes a subject for profitable study and thoughtful consideration.

CHARLES SUMNER LOBINGIER.

COURT OF FIRST INSTANCE,
MANILA, PHILIPPINE ISLANDS.

[For the results of popular votes in November, 1908, on initiative and referendum amendments, see *infra*, RECORD OF POLITICAL EVENTS, UNITED STATES, STATE AFFAIRS.—EDS.]

¹ See article by W. S. U'Ren, *The Arena*, XXXII, 128.

² See *Review of Reviews*, XXXIV, 143; POLITICAL SCIENCE QUARTERLY, XXII, 484, 494. The article last cited quotes a visitor in an Oregon village as saying: "There can be no question of the fact that the voters were much interested, and the more intelligent ones had a sense of responsibility which made them express themselves with a good deal of emphasis."

³ See *The Independent*, LIV, 1977.

POPULAR LEGISLATION IN THE UNITED STATES

THE VALUE OF THE SYSTEM

THE legislature is, in popular estimation, the least efficient of the departments of state government. In our states the executive and judiciary are seldom subjected to severe criticism. Adverse comment upon these departments is directed almost entirely against individuals rather than against the system. When the legislature is mentioned, however, there is a feeling that representative government has to a considerable extent failed and that a radical change is needed. The remedy usually advocated is the initiative and the referendum.

Direct popular legislation is, of course, no new thing, nor is it incompatible with representative government. We have constantly had primary as well as representative legislation. Massachusetts had its town meetings as well as its General Court. We have long had the referendum for constitutional amendments. Our legislative system, however, is and will continue to be in the main representative. The initiative and referendum do not concern themselves with the ordinary mass of legislation. They only modify the present system by endeavoring to afford exceptional relief in extreme cases. If any extraordinary relief is necessary, we must then determine whether the initiative and referendum are the best means for meeting the situation. This is not a question as between democracy and aristocracy, but as between good or poor laws. Will the initiative and referendum improve our statutes?

Before this question can be answered it is necessary to determine wherein and to what extent our present legislative system has failed. It is not necessary to enumerate all the defects of our legislatures and to show the nature and extent of each defect, nor would this be possible within the limits of a single article. It is desirable, however, briefly to indicate the directions in which legislative dereliction is possible and the evils which the initiative and referendum are expected to cure.

The legislature may sin by commission. It may and does enact laws which are unwise, uncalled-for, ill-considered or positively bad; and the number of these laws is so great that some remedy is called for to prevent their further increase. Among the laws which are especially objectionable are those that extend improper favors to special interests; those that attempt unwise interference with human conduct; and those that are intended to accomplish a proper purpose but are so poorly worded and ill arranged that their object is not attained.

The body of state laws falling under the first category is not large. Acts which make special grants of franchises or powers are not numerous; our legislatures offend less often in this manner than do our municipal councils. Nearly all our state constitutions contain prohibitions against special legislation, and the extension of legislative power in this direction is undoubtedly best curbed by such constitutional limitations and their careful enforcement by the courts. Measures which are general in form but which are intended to benefit some politically powerful class are probably more numerous. Whether the class that is benefited consists of capitalists or of laboring men, the desirability of some device which will check legislative encroachment in this direction must be admitted.

As regards the second category of objectionable laws, those which interfere unwisely with human conduct, critics necessarily differ. What seems unwise and therefore objectionable to one man appears wise and desirable to another. Everything depends upon the point of view of the critic, upon the system of social and political philosophy of which he is an adherent. The great legislative activity of recent years in the regulation of business is regarded by some as an indication of the highest wisdom; by others it is considered as an unwarranted interference in private affairs, resulting in disaster not only to the businesses affected but also to the public. Legislative activity in this direction is in accordance with the collectivist spirit of the times. *Laissez faire* is political bad form. The majority of social thinkers, and especially those who advocate the initiative and referendum, do not regard the work of our legislatures in this direction as in need of any check.

The third class of objectionable laws, consisting of measures that are defective in form, that fail to accomplish the desired end because of the lack of skill with which they are drawn, is undoubtedly very large. An examination of the session laws of the last few years shows many laws which are apparently designed to accomplish laudable objects but which are so worded and arranged that their meaning is doubtful and their efficacy very problematic.

Probably the direction in which legislatures are commonly supposed to be most at fault is in failing to enact laws which are really necessary. They undoubtedly refuse to pass laws which are for the public interest; decline to accede to demands for the correction of evils; neglect to recognize needs for advanced legislation. The extent to which they have thus failed is, however, a debatable question. Here, too, everything depends upon the point of view. During the last few years our lawmakers have undoubtedly responded to popular demands for the regulation of railroads, of public-service corporations and of insurance companies. Where they have failed to meet more radical views it is probably because the more radical element is in the minority.

This is then the bare outline of the modern legislative problem. It is recognized as desirable to prevent the passage of laws which are in themselves bad; to improve the form of laws which seek to bring about a desired result; to secure laws which will better and more adequately correspond to modern conditions. To what extent will the initiative and referendum assist in the solution of this problem? A consideration of this question require sfirst an examination and explanation of these plans for direct legislation.

The referendum consists in a popular vote upon a proposed law. It may be either optional with the legislature or obligatory upon it. In the former case, the legislature which desires for some reason to obtain an expression of the popular sentiment upon a pending measure may provide that it shall not be in force until ratified at an election. This device has sometimes been resorted to under our present legislative system, but in many states it is not now allowed because it is con-

sidered a delegation of legislative power. Where no such constitutional prohibition stands in the way, a legislature may at any time attach such a condition to a law. In states where this is not allowed, a simple constitutional amendment would change the situation. There exists, however, no particular sentiment in favor of the extension of the optional referendum.

The obligatory referendum provides that the ordinary legislative enactment shall be suspended for a certain time, usually ninety days from its passage. During that period a petition filed by a designated percentage of the voters may further set aside any law until it can be submitted to and ratified by a popular vote. Under some of these provisions the filing of a petition signed by the minimum number at once nullifies the law, while in others a larger petition is required to prevent the law from taking effect. After such a petition is filed, the vote is usually taken at the next general election. From the operation of this referendum petition are excluded certain emergency measures, including appropriation bills, which require a special vote for their enactment in the legislature.

The other use of the obligatory referendum is after a bill has been submitted by an initiative petition. In such a case the bill either goes directly before the people for a referendum vote or is presented to the legislature for its action. Should the legislature adopt the bill, it is treated like any other legislative act and is not subjected to the referendum unless a petition calling for such a vote is filed as in other cases.

The initiative is the power given to the people to propose bills. In all the plans presented for consideration the initiative is coupled with the referendum. The referendum, as already indicated, may stand alone and operate only upon bills which have passed the legislature. The initiative cannot stand alone. The mere power to submit a bill to the legislature does not require any special or novel machinery. Under our present legislative system any body of voters, however small, may easily have any special measure brought to the attention of the law-makers, as there is always some member who will introduce a bill "by request." In addition to the power to introduce the bill, there is needed the power to compel its adoption. This additional power is found in the referendum.

As has already been noted, the intervention of the legislature between the initiative and the referendum is not absolutely necessary. In what may be called the most democratic form of this plan, the bill, accompanied by the requisite petition, is filed with the proper officer, who thereupon submits it for ratification at the next election. If approved, it becomes a law without further legislative action. If carried to its logical extreme, this plan might do away with the legislature entirely; but at present it is intended to be employed in emergencies only, when legislative action cannot otherwise be secured.

Where the bill is first presented to the legislature for its action, two plans are proposed. Ordinarily the bill must be adopted without amendment or it is treated as rejected and thereupon goes before the people for their action at the next election. According to the other plan, recently adopted in Maine and proposed in North Dakota, the legislature may propose an alternative bill, in which case both measures are submitted and the one receiving the highest vote becomes the law.

It is evident that the initiative and referendum are complementary. The referendum when used alone affords a check upon legislative action but does not provide for positive action by the people. The initiative when used alone is practically worthless. The combination of the two plans affords to the people both opportunity to disapprove all laws which they do not want and means to compel the adoption of laws which they do want.

The optional referendum supposes a willingness on the part of the legislators to allow the people to pass upon their work. It is thus useless as a check to unwise legislation. If the members of the legislature do not regard the rights of the people, if they enact unwise or dangerous laws, they will not give the people an opportunity to vote upon these laws. The optional referendum therefore will be used almost exclusively when the legislature desires to shift from its own shoulders the responsibility for a particular law. The obligatory referendum, on the other hand, is not open to these objections. It allows the voters, if they so desire, to bring to a vote and to reject any

law which the legislature may propose. If the referendum is feasible, it thus affords a check upon unwise or improper legislation which the optional referendum does not afford.

In considering the value of the referendum, one of the principal tests which may be applied is to see whether the bills upon which it operates are ordinarily rejected. The referendum which habitually adopts laws, either because those which are brought under its operation by the petitions are those which are desired by the people or because the popular vote fails properly to express the best public sentiment, is useless. The state has been put to the trouble and expense of a referendum only to leave the matter exactly where it was before.

To the extent that bad laws consist in improper grants of power to special classes, the referendum may afford a wholesome check, and it is in this direction that most may be expected from it. The voters are much more ready to guard their interests when it is believed that valuable privileges or franchises are being given away than they are at any other time. But, as has been already indicated, in the modern state the number and importance of such laws is not great. The valuable franchises and grants of power are largely in the hands of the municipalities and smaller units. With the referendum in these cases we are not here concerned.

Where the legislature enacts improper laws for the benefit of one social class at the cost of another social class, the referendum may again be of benefit. An organized minority may control the election of a majority of the members of the legislature but may not be able to control the referendum vote; and in so far as this is the case, the plan would be a check upon improper laws of this kind. Whether such a minority would be able to control the popular vote depends upon the efficiency of the referendum as a registry of the best public opinion.

The tendency towards the more general regulation of affairs, and particularly of the business of the community, if an evil, would probably be little affected by the referendum. The great growth of law in this field, hasty and ill-considered as it sometimes may be, is undoubtedly the result of a demand on the part of the people. Few if any of the laws of this

nature passed in the last ten years, which have given rise to the complaint of "over-legislation," would have been defeated if submitted to popular vote.

In order that the referendum may operate as an efficient check upon bad laws it must be intelligently directed. Those laws which need to be held up must be discovered before the end of the ninety days within which it is usually provided that the petition must be filed, and the requisite petition must be secured and filed within this period. If the referendum is to operate effectively in this regard, there must be a careful examination of the laws by persons who are interested in legislative matters and who are willing to scrutinize the acts of the legislature and to devote themselves to the task of securing the necessary petitions. In all probability only a portion of the bad laws will be discovered to be bad within the time limit. Unless the present means for the publication of our state laws are greatly improved, the public generally will be ignorant of the provisions of a large majority of the laws for a considerable period after their passage. It may be expected, therefore, that only those laws in which there is a very general interest, or which so affect the interests of particular individuals that they will make it their business to see that the petition is secured, will be subjected to the popular vote.

One very real danger must be noted. This is that the referendum may be used not only against laws which have been secured by an active and well-organized minority, and which subserve special or class interests, but also to suspend until the next general election laws which are really desired by the people. In order that the referendum may have any effectiveness the percentage of voters necessary to secure the popular vote cannot be very large. It must be a number which can be secured without any real difficulty within the limited time. This requirement makes it possible for special interests which are adversely affected by legislation to prevent its taking effect for a considerable period. That this objection is not fanciful may be seen in the experience of South Dakota last year. In that state petitions have been filed for popular vote upon three laws passed by the legislature of 1907. These laws are: an

act extending to one year the period of residence necessary for securing a divorce, an act prohibiting the shooting of quail until 1912, and an act prohibiting theatrical exhibitions, circuses *etc.* upon Sunday.

After the referendum petition has been filed there is still the question of the efficiency of the popular vote. If the bad laws do not, on the whole, slip through unobserved and unchecked by petition, and if the plan be not used to suspend good laws, it is still necessary that it shall secure an expression of the best public sentiment.

Such data as we have show that the referendum vote will be comparatively small. The ordinary experience with these popular votes, either upon laws or upon constitutional provisions, indicates that the vote cast on such questions is usually much smaller than that cast at the same time for candidates for public offices. In an article by Philip L. Allen in the *Boston Evening Transcript* of May 23, 1906, figures were given showing the popular vote upon various laws or constitutional amendments. In the instances there cited, seventeen in number, the percentage of this vote to the simultaneous vote for public officers varied from seventy-eight to nineteen. In eight instances the vote was less than fifty per cent; in only six instances did it exceed sixty per cent. The vote at the special referendum election in Oregon, June 4, 1906, was considerably higher than this. The vote for governor in that year was 96,715; the vote upon the referendum measures, partly constitutional amendments and partly laws, varied from 83,899 to 63,749. The highest vote noted was that in which the constitutional amendment extending the suffrage to women was defeated.

The experience in Oregon seems to be exceptional. The large vote seems to have been due partly to the novelty of the legislative referendum and partly to the interest aroused in the "equal suffrage" campaign. This single instance has little weight as against the experience of various other states, in which observation shows that in the long run only about one-half of the voters who go to the polls will take the trouble to vote upon laws submitted to them.

These comparisons are made with the number who vote for

public officers. If a comparison be made with the total number of the legal voters of the state, the results are much more striking. In an election which for some reason calls out a large vote, as in a presidential year, the total vote cast may run up to about eighty per cent of the voters. In Wisconsin, for instance, in 1904, the vote for governor was seventy-eight and seven-tenths per cent of the voters. In a year in which the general interest is not so great, as for instance in a so-called "off" year, the vote is regularly much smaller. In Wisconsin, in 1906, the vote for governor was fifty-six per cent of the voters. If only sixty to eighty per cent of the voters come to the polls, and if only about one-half of these vote upon referendum matters, even a unanimous vote in favor of a measure means its adoption by a minority of the legal voters of the state.

This does not necessarily condemn the referendum as a piece of legislative machinery. If those who vote are the most intelligent, if they express the best public opinion, if the influence of the uneducated and the corrupt is substantially eliminated, and if those who do vote upon the question vote with intelligence, we may still, in spite of the smallness of the vote, have conditions under which the referendum may be considered as an efficient aid to the work of the legislature.

Statistical studies as to the relative intelligence of the voters and non-voters upon referendum measures are unfortunately lacking. Perhaps in the future some investigation of this question may be undertaken. It would require an investigator with courage enough to make necessary but perhaps invidious distinctions between various voting precincts, in order to determine whether the vote upon a particular question came from the portions of the community which might be considered the most intelligent. For myself, I should not care to undertake such a task. I may, however, offer certain observations upon this problem from an *a priori* standpoint. There seems to be little reason to expect that the better element will vote any more strongly at a referendum than at a regular election. The "stay-at-home" vote would be the same in both cases. There is no indication that a referendum election tends to bring to the polls those who do not care to vote for the candidates for public offi-

ces. The citizen who does not care to go to the polls and vote for governor would probably not be attracted thither by a chance to vote against a proposed law. If our present political agitation does not stimulate him to activity, there is little hope that additional demands upon his time would move him. It may also be questioned whether those who now neglect their political duties would be a desirable addition to a body of citizens voting upon a proposed law.

Taking those who do their duty in this respect, who regularly vote at the polls, may we assume that the portion of these electors which votes for or against pending laws represents the more intelligent or better element? It is commonly considered that much of the trouble encountered in the working of our present political system is due to the fact that those who ought to know better ignore their political duties. The more intelligent citizen, when he votes at all, is unfortunately too apt to confine his voting to the election of officers, and not infrequently he indicates his choice for only a portion of the offices to be filled. He does not come out to the primaries or to the caucuses. Can we then expect that the better element will constitute, or preponderate in, the body which votes upon pending bills?

What of the other sort of voter, the man who votes at least as often as the law allows, who does as he is told and who furnishes the strength of the machine? Voting on a few laws would offer no terror to him. He could quickly learn where to make the additional marks upon the ballot, and he would remember what was expected of him. There would therefore seem to be little hope that the vote on a law would express any higher public opinion than the vote for the members of the legislature.

In order that the referendum may be a success, it is not only necessary that the voter should be intelligent but that he should vote intelligently. The one does not follow from the other. Intelligent voting demands a thorough knowledge of the subject to be voted on, and it requires a careful study of the proposed bill. In order that one who is to vote upon a pending measure, whether he be a member of the legislature or a legislator under

the referendum, may do so properly, he should have made a thorough examination of the proposed legislation in all its various aspects; he should have at his command the reasons for and against the pending bill; he should be ready and willing to listen to argument both from those who favor and from those who oppose the measure; and he should be in a position, when the time comes for voting, to cast his vote with an entire appreciation of its effect.¹ It may be objected that this is an ideal not reached by the members of our legislatures. In most cases, this is undoubtedly true. It is, however, an ideal which we may place before our legislators and towards which all other legislative reform should tend. It is not an ideal which the voter under the referendum may hope to attain or even approximate. If we admit, as I think we must, that the proper goal of legislation is a better and more intelligent consideration of pending measures, we must acknowledge that the referendum brings us no nearer that goal. In fact, it probably takes us in the other direction. The consideration which the vast majority of voters can give to a measure submitted to them is necessarily hasty and superficial. A careful examination of even a few laws, in the manner which I have indicated as necessary for a proper appreciation of the effect of one's vote, is impossible to practically every person outside of the legislature. The ordinary voter has little or no time to give to the examination of bills which may be presented to him. If he has the time, he seldom has the facilities for obtaining the information which is needed if he is to vote in a proper manner. Comparatively few voters possess the information which is necessary for an intelligent judgment regarding the numerous candidates and issues of our various elections. Until the voters meet these existing obligations imposed by our political system, obligations which cannot be done away with by any system of initiative or referendum, we should hesitate to place new burdens upon them.

The referendum tends to place the emphasis at the wrong end of the legislative work. If we elect good men to the legis-

¹ The most serious efforts to instruct the voters regarding measures submitted to them have been made in Oregon. See G. H. Haynes, "The Education of Voters," in *POLITICAL SCIENCE QUARTERLY*, XXII (1907), 484-497.

latures the need of checks of this kind will largely pass away. The agitation for the referendum has been to a considerable extent due to the failure of the voter properly to perform his duties as an elector. However numerous and complex the causes of this failure may be, one cause which has been very potent is the public indifference to caucuses and elections. If this public indifference continues, we cannot expect that the referendum will be successful. With this indifference removed, the need for the referendum will no longer be so apparent.

An interest in referendum measures can never be a substitute for an interest in elections. The referendum is exceptional. It can never be expected to operate upon more than a few of the many laws enacted. The bulk of our legislation must continue to proceed from our legislatures, unchecked by the referendum. The referendum is then a method of legislation which can affect only a small fraction of the laws, and it depends for its efficiency upon conditions which, if realized, would make its employment largely if not entirely unnecessary.

The initiative, as has already been noted, is the complement of the referendum. It presupposes a failure of the legislature to act or to act properly upon a question where legislative action is needed. The bill proposed by a certain number of voters presents to the legislature evidence of a popular demand for its action. If the legislature conceives that this demand is well founded and that the bill submitted provides a satisfactory method of meeting the demand, it enacts the bill into law. If it does not approve of the demand or of this particular expression of the demand, it rejects the bill, which then goes before the people for a referendum vote.

Against the initiative, as far as its referendum feature is concerned, the same objections may be made as against the referendum when used alone. The popular vote upon a bill proposed by the initiative would be no better and no worse than on a bill passed by the legislature. The initiative would, however, add to the number of bills to be voted on and would thus decrease the attention which the voters could give to each one.

What sort of bills may we expect to see proposed under the initiative? It is not especially important to determine whether

they will be conservative or radical. If the system is worthy of adoption, undesirable bills will be eliminated by the referendum. The question is as to the form of the bills. Is it to be expected that they will be so worded as to accomplish the desired ends?

The importance of a proper form of law is apparently little appreciated. It is easy to say that we will regulate the railroads or the telephone companies. It is harder to determine the extent and details of such regulation. It is even harder so to work out the proper expression of the principles we have adopted that the plan will not miscarry. It was said by Austin, in his *Jurisprudence*:

I will venture to affirm that what is commonly called the *technical* part of legislation is incomparably more difficult than what may be called the *ethical*. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver.

The same idea was expressed by a legislator, who told me: "When I first came to the legislature I introduced a bill to prohibit the manufacture of filled cheese. It would have done it all right, but it would have prevented the manufacture of all other kinds of cheese, too!"

Practically every bill which comes before an American legislature is originally introduced in such form that its passage would be extremely unfortunate. It is probably not too much to say that nearly all bills are, in their original form, crude and unworkable. These bills—and the same would be true of those proposed by initiative petition—are the product of one man or of a small group of men. Even when based on a careful and conscientious study of the subject, they have the shortcomings inevitable from the limitations surrounding their origin. Before they can even approximate perfection, they need the public discussion, the criticism of opposing interests, the suggestions of foes as well as of friends. The process of amendment and re-amendment, which is possible only in a legislature, is necessary to the normal growth of a bill into a law.

Every subject of importance is apt to be covered by several bills. None of these is perfect; each probably has something

of merit. In the legislature, these bills can be considered together; the good portions of each can be accepted and the bad rejected. No such procedure can be followed in the case of initiative measures. If several similar bills are proposed by petition, they cannot be amended and combined. One must be selected and the others rejected, unless, as is entirely possible more than one act dealing with the same subject is adopted by the popular vote.

The failure of the referendum to afford opportunity for adequate discussion has already been noted. This defect will be felt much more keenly in the case of bills proposed by initiative petition than in the case of bills which pass the legislature in the regular way before they are submitted to the referendum. In the latter case, discussion in the legislature enables that body to bring the bill into something like proper shape. In the former case all the advantages of such discussion, all the suggestions to be derived from the arguments of interests adversely affected by the bill, all the amendments that might be made by parties interested in its passage, are lost. Intelligent legislation is not promoted by a system which treats a bill, in the shape in which it is presented to a legislature, as a finality.

An illustration of the difference between initiative and regular legislation is found in the "anti-pass" law of the state of Oregon. In 1906 a bill covering this subject was submitted by initiative petition and was adopted by a vote of 57,281 for and 16,799 against. This bill was so poorly worded that, upon a literal reading, it forbade a railroad from issuing passes to its own employees but allowed it to issue them to the employees of other roads. Fortunately the act was not effective, because of the absence of an enacting clause. The legislature of 1907 passed a general railroad law in which the subject of passes was covered in a proper and intelligible manner.

The failure of the initiative to afford opportunity for amendment is met to some extent in the system adopted in Maine and pending in North Dakota. In these states, the legislature may reject the initiative bill and propose a substitute. In such a case both bills are submitted to popular vote, and the voters are called upon to choose between them. This device enables the legisla-

ture to correct faults in the proposed legislation. The substitute will undoubtedly be far superior to the initiative bill. The existence of the two bills will, however, complicate greatly the work of the people. The voting upon a single bill is difficult enough; the choosing between competing bills will be much more difficult.

The most that can be claimed for the initiative is that it forces the legislature to act. The laws resulting from this coercion will in most cases be crude and unscientific. From the point of view of the improvement of our legislation in the matter of form, they will mark a long step backward. Unless the force of public opinion is insufficient to bring about needed legislation through the regular channels, the initiative cannot be considered desirable.

No statistics are available, nor is it easy to conceive how statistics could be secured, showing operation of public opinion. I believe, however, that wherever there exists in favor of a measure a public opinion strong enough to ensure the preparation of a bill, to secure the necessary signatures to an initiative petition and to effect the adoption of the bill by popular vote, the same result will be obtained, and on the average more quickly, through the regular legislative processes. The recent laws for the regulation of railways, the laws affecting public-service corporations in New York and Wisconsin, the restrictions imposed on insurance companies, are among the many evidences of the power of public opinion. Indeed, some think that the passage of two-cent-fare laws has shown that the legislatures are too responsive to public opinion.

The members of the legislature are in a very direct sense responsible to the people. It is true that the "boss" has frequently dictated nominations and controlled elections. Under such circumstances the legislator may care little about public opinion. This situation is, I think, not the result of any defects in our legislative system but of public indifference. When the public takes an interest in the work of the legislature, it will take an interest in the persons nominated and elected to the legislature. When this latter interest is manifest, the members will respond to the wishes of their constituents. Until such an interest is taken, the initiative and the referendum will be useless.

After the initiative bill becomes a law by popular ratification, it occupies a somewhat peculiar position. It is, under all the plans proposed or in operation, subject to amendment or repeal like any other act. It would, of course, be possible to give such a law a higher status by providing that it should be repealed or altered only by popular vote. The wisdom of such a solution may be doubted. Legislation, and particularly the advanced legislation which would probably result from the initiative, is experimental. It is apt to need frequent adjustment to changing conditions or to unforeseen exigencies revealed in its practical operation. A plan which would prevent the amendment of an initiative law by the legislature would deprive our laws of a very necessary flexibility. On the other hand, if authority is left in the legislatures to amend or to repeal acts of popular legislation, many of the alleged merits of the initiative are lost. If the legislature needs to be coerced into enacting a law, if it acts only under compulsion, it may take the first opportunity to repeal or at least emasculate the law which has been forced upon it. This may be considered an overdrawn picture, but it must be remembered that the initiative is based upon the assumption that the legislature is not to be trusted.

Such a legislature, however, is more likely to pursue a different course. As we have already seen, the law passed by the aid of the initiative and referendum is apt to be crude in form. If left unaltered it tends, even if it be not absolutely unworkable, to discredit the perhaps excellent principle embodied in it. The hostile legislature then needs only to let it alone. This is very easy. The plea that the law is not to be amended by the legislature, that the sovereign people have spoken and that their mandate must be obeyed literally, will often be heard. This specious plea is one which a legislature will be quick to use, if it desires to discredit a good principle embodied in a bad law.

One other and very fundamental objection may be made both to the referendum and to the initiative. They tend to weaken the sense of legislative responsibility. With the referendum the legislator does not vote for or against a bill, he votes to give the people an opportunity to vote on it. He does not need to ex-

press his own opinion. He may say that his views are immaterial, that even if he is opposed to a bill it would be unjust to refuse to allow the people a chance to express themselves. This feeling will affect his attitude towards all bills, irrespective of the question whether they are actually to be subjected to a referendum vote. Every bill may be thus subjected, and if no petition is filed concerning a particular measure, the people may be considered to have ratified it. They have had the opportunity to act, and if they remain quiescent the responsibility for the bill rests with them, not with the legislature.

The initiative would also shift responsibility. If new laws are needed, they may be submitted by the initiative petition. If the legislators do not propose the measures needed, they are not to be blamed. The failure of the people to use their initiative indicates that they do not desire action upon the matter.

The diffusion of responsibility which would result from shifting the burden of legislative reform from the few to the many is in direct opposition to the teachings of political experience. The way to get good government is not to scatter the responsibility among a number, so that each can dodge the blame if the work goes ill or claim the credit if it goes well. The approved way is to make each responsible for his appointed task and to hold him rigidly to that responsibility.

Progress in legislative reform is to be attained, I believe, not through any radical change in our system of representative government, but rather through the selection of better men as members of our legislatures, through improvement of the machinery of legislation, so that the members will know what they are doing, and through a diminished demand for prompt legislative action in every social emergency, real or fanciful. If legislation can be confined to the matters in which it is really required, our legislators will have time to do their work in workmanlike fashion.

JOHN BELL SANBORN.

MADISON, WISCONSIN.